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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TEMPLETON COAL COMPANY, INC., *et al.*,
Petitioners,
v.
SHIRLEY CHATER,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

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The Briefs in Opposition drain all meaningful content from the Court's decisions on retroactive legislation. Rather than address the extreme retroactivity of the Coal Act, they seek to erase time by arguing that the events of the next forty years were obvious in 1954, when Templeton closed its last coal mine. The implicit claim that Congress enjoys an unlimited right to adopt retroactive economic legislation is clearly contradicted by the Court's decisions. *United States v. Carlton*, 114 S. Ct. 2018 (1994); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Pension Benefit Guar. Corp. v. R.A.*

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[1] The Commissioner of Social Security is substituted for the Secretary of Health and Human Services as a party in this case. *See* Sup. Ct. R. 35.3; Government Brief in Opposition ("Govt Br.") at n.1.

Gray & Co., 467 U.S. 717 (1984); *Usery v. Turner Elkhorn Mining Co.*, 478 U.S. 1 (1976). The petition warrants Court review to define where the constitutional limits lie.

A. 1. The government basically acknowledges that the Coal Act visits "harsh" and "oppressive" consequences on Petitioners Templeton *et al.*, yet argues that the law is "rational economic legislation." Government Brief in Opposition 17-18 ("Govt. Br."). The government's argument subsumes the essential question presented by the petition: can an admittedly "harsh and oppressive" retroactive statute pass constitutional muster as "rational"? The Court has previously equated the "harsh and oppressive" standard with "arbitrary and irrational," *R.A. Gray*, 467 U.S. at 733, suggesting that a retroactive law which imposes harsh and oppressive results is thereby irrational and violative of Due Process. Recent decisions continue to use the phrase, *see Carlton*, 114 S. Ct. at 2022, so we know it is not meaningless. As the Coal Act applies to Petitioners—suddenly imposing a contribution obligation for fifty or more years, mainly to provide benefits to miners' relatives, because Petitioners once employed UMWA miners four decades ago—it provides a best-case scenario for the Court to clarify the standards for judging retroactive economic legislation under the Due Process Clause. The instant petition represents the first case to reach the Court in which the extraordinary retroactivity of the Coal Act is at issue.[2] Direction from the Court is needed to settle whether a retroactive statute affecting economic rights and producing harsh and oppressive results can now, or ever, violate Due Process standards.

2. The court below and the Oppositions erroneously cite the miners' expectations of continued benefits as relevant to the constitutional analysis. Pet. App. 20a-21a; Govt. Br. 14-15; Trustees' Brief in Opposition 21 ("Tr.

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[2] The Coal Act has generated numerous challenges across the country. *See* Govt. Br. 10-11 & n.5.

Br.") However, the constitutional rights of UMWA miners are not in question. The "legitimate expectations" to be analyzed belong to those who bear the burden of a law, not those who benefit from it. The issue is not whether UMWA miners (or, more precisely, miners' spouses and dependents) had a legitimate expectation in 1992 that benefits would continue, but, rather, whether *Petitioners* had a legitimate expectation *in 1954*, when Templeton ceased mining coal, that the terms of the collective bargaining agreement and the relevant law under the National Labor Relations Act, 28 U.S.C. §§ 151 *et seq.*, meant what they said: Petitioners had no obligation and no right to affect future UMWA negotiations because they no longer employed UMWA miners. *See Association of Motion Picture Producers*, 90 N.L.R.B. No. 296 (1950) (a bargaining unit must have at least two employees). Correspondingly, Petitioners were incapable of enjoying any benefits from the later contracts. Petitioners became legal strangers to the UMWA and its collective bargaining.

3. Contrary to the government's argument, Govt. Br. 18, a Due Process analysis does rely, in part, on whether a new liability was foreseeable. *United States v. Hemme*, 476 U.S. 558, 569 (1986); *Turner Elkhorn*, 428 U.S. 17. The government suggests that the Court's decision in *Turner Elkhorn* "is directly to the contrary," Govt. Br. 18 n.8, but only because the Opposition inexplicably omits part of the relevant language. The full statement from *Turner Elkhorn* is that "the justification for the retroactive imposition of liability *must take into account* the possibilities that the Operators may not have known of the danger" of coal dust. *Turner Elkhorn*, 428 U.S. at 17 (emphasis added). The Court did not elaborate in *Turner Elkhorn* because it found those operators had known of pneumoconiosis for 20 years. *Id.* Here, the 1950 NBCWA and those Amendments signed by Petitioners required contributions only for the term of each contract. Petitioners fully satisfied their obligations when

they ceased mining coal, and the miners knew, as the trustees admit, that "the continued provision of health care depended on the negotiation and signing of a new collective bargaining agreement that contained such benefits." Tr. Br. 26. Moreover, the record is clear that miners and retirees did *not* enjoy "continuous health benefits" under the 1950 W&R Fund, as the trustees claim. Tr. Br. 29; *but see* Tr. Br. 5 n.3 (admitting that benefits were "increased, decreased, or suspended" from time to time). Very recently, the Court has highlighted "fair notice and repose" as significant elements to a Due Process review of legislative enactments. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994); *United States v. Carlton*, 114 S. Ct. 2025 (O'Connor, J., concurring) ("[t]he government's interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose"). This case presents the point at which the government's interest must "give way."

4. The trustees suggest that the Coal Commission recommended that all former signatories to the NBCWA be liable for Mine Worker benefits. Tr. Br. 9-10. This is clearly not so. The Commission's recommendation was: "CONGRESS SHOULD IMPOSE A STATUTORY OBLIGATION TO CONTRIBUTE ON SIGNATORIES TO THE [NBCWA] OF 1978 AND ANY SUCCESSOR AGREEMENT." Coal Commission Report at 63 (emphasis in original.)

5. The trustees incorrectly suggest that Berwind continued to mine coal after 1962. Tr. Br. 14. Berwind invested in a new subsidiary, Reitz Coal, after 1962 and Reitz Coal continued its mining operations for some time. But, Reitz Coal is a separate corporation, is not a party, has not challenged its assignments of beneficiaries, and makes monthly contributions to the Combined Fund. Berwind has here challenged the constitutionality of assignments *to Berwind* based on the fact that Berwind, under the name Berwind-White, mined coal and signed

the NBCWA until, facing enormous losses, it closed its last mine in 1962.

6. When the last Petitioner stopped mining coal in 1966, the 1950 W&R Fund had a positive balance of $145,021,431.00. Petitioners played no part in the BCOA's voluntary decision much later to create the 1950 and 1974 Benefit Funds with a zero funding base, to provide benefits to UMWA retirees whose employers were not mining coal, to expand benefits and to offer benefits to new beneficiaries, to promise lifetime benefits, to guarantee full funding, and to fail to make any adjustments to meet those promises as time went by. Presumably, the BCOA members received a collective bargaining benefit from these promises; certainly, Petitioners did not. By 1993, these cumulative promises by the BCOA required all signatories to continue to contribute for retiree health benefits as long as they continued to mine coal, even if not signatory to the NBCWA. *UMWA 1974 Pension Fund v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993). It is a myth of litigation, unrelated to the real world, that Petitioners are responsible for the sorry state of the 1950 and 1974 Benefit Funds in 1992. Tr. Br. 15-16.

7. The trustees' fervent wish that the Coal Act were not retroactive as applied to Petitioners, Tr. Br. 20, cannot be squared with the law itself, this Court's prior decisions, and the decision of the court below. *See* Pet. 9-10; Pet. App. 13a-14a. *Because* the law is retroactive, it "does have to meet a burden not faced by legislation that has only future effects." *R.A. Gray*, 467 U.S. at 730. The court below thought the burden was met because Petitioners once employed UMWA miners, retirement benefits must be preceded by years of service, and additional monies might be needed to support the expensive health plan developed by the UMWA and BCOA in the era *after* Petitioners stopped mining coal. Pet. App. 19a-22a; Govt. Br. 14-16; Tr. Br. 21. It is true that each Petitioner

once employed UMWA miners, but that employment relationship was fully satisfied long ago.[3] In any event, Petitioners' obligations under the Coal Act far exceed benefits to their former employees—the law imposes costs for spouses and dependents, who never worked for Petitioners and were not beneficiaries when Petitioners mined coal, and for persons who worked for other companies, plus *their* spouses and dependents. If a desire for more money were sufficient to support every congressional enactment, there would be no constitutional limitation left at all. The arguments posed by the Oppositions demonstrate that this is the appropriate case for review and clarification of Due Process standards.

B. 1. The government claims that the Coal Act comports with the Taking Clause because payment of Coal Act premiums is similar to payment of withdrawal liability under the Multiemployer Pension Plan Amendments Act ("MPPAA"), whose constitutionality was upheld in *Connolly*, 475 U.S. 211, and *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). Govt. Br. 18-19.[4] But the general

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[3] The government argues that miners were "entitled" to receive benefits from the 1950 and 1974 Benefit Funds and that, therefore, it is rational to impose costs for those benefits onto Petitioners. Govt. Br. 14-15. Whatever "entitlement" arose because of the promise of lifetime benefits and the guarantee of full funding, it occurred decades after Petitioners stopped mining coal. It is clear that there was no entitlement to benefits extended by the 1950 W&R Fund. Tr. Br. 8 n.3 & 29.

[4] The government invokes the *Connolly dicta* that, because the Court had previously rejected substantive due process challenges to two statutes in *Turner Elkhorn* and *R.A. Gray*, "it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." Govt. Br. 19. But the Court did not forgo a separate Taking Clause analysis and granted *certiorari* in *Connolly* for that very purpose despite the earlier holding in *R.A. Gray*. The two Clauses protect different interests and require different analyses. *See Concrete Pipe*, 508 U.S. at 641-42 (quoting *Connolly dicta* and analyzing Taking Clause issue separately).

similarity noted by the government—neither statute involves a physical invasion of real property—is dwarfed by the dissimilarities that make this case worth the Court's review. As *Connolly* stated, "This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation." *Connolly*, 475 U.S. at 224. The Coal Act differs from MPPAA in terms of (1) the predicate relationship between employers and the fund, (2) the vesting of benefits, (3) the absence of existing employer liabilities to the funds, and (4) the duration of retroactive reach. Pet. 20-21. That these distinctions bear on constitutionality is clear from the concurring opinions in *Connolly* and *Concrete Pipe*. *Id.* at 22-23. Therefore, they warrant the Court's attention here.

2. The government also asserts that Petitioners have not identified any property that was taken without just compensation. Govt. Br. 20. Of course we have—Petitioners' interest in the repose of their long-expired contracts and the millions of dollars Petitioners have already contributed to the Combined Fund, much less what will have to be paid into the middle of the next century. Pet. 9. The government's amalgam of several decisions, principally *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), does not add up to the conclusion that Petitioners cannot identify "property" taken without just compensation. *See* Govt. Br. 20. *Webb's Fabulous Pharmacies* makes clear that money, no less than real property, can be the basis of a Taking claim, and that the government need not appropriate all of a claimant's money for a Taking to occur. To be sure, Congress can legislate in response to perceived emergencies, but in such instances, a "significant, concrete, and disproportionate benefit" must flow to a burdened party before its property can be appropriated for public use. *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992) (collecting cases). Petitioners here

receive no such benefits. It is no answer that Petitioners once benefitted from miners' labor a generation ago. *See* Govt. Br. 26. Petitioners' relationship with the UMWA ended both in fact and in law when they stopped mining coal and employing Mine Workers. The Coal Act imposes an entirely new obligation, for which there is no reciprocal benefit.[5]

3. With respect to the Coal Act's economic impact on Petitioners, the Oppositions contend that there is no disjunction between provisions for the 1950 W&R Fund in the 1950 NBCWA which Petitioners signed, and the new Benefit Plans established in the 1974 and later agreements to which Petitioners were not parties. Govt. Br. 21-22; Tr. Br. 23-24. But the proposition on which they rely—the Seventh Circuit's statement that "nothing radical happened in 1974," Pet. App. 28a—is contradicted by the record and the statute. The district court correctly found that a "significant change" occurred in the 1971 NBCWA, that "[s]ubstantially more radical changes developed as a result of the 1974 NBCWA," and that the 1978 NBCWA "brought about still more changes in UMWA retiree health benefits." Pet. App. 89a-90a. Indeed, the Funds' own 1975 Annual Report characterized the change in the 1974 NBCWA as "one of monumental change which will have long-lasting and historical effects." Thus, contrary to the trustees' revisionist view, Tr. Br. 23, the changes affected much more than just the name of the fund. Pet. 5-6. The statute at least attempts to recognize this reality by prioritizing assignments as between signatories to the 1978 NBCWA and earlier contracts. 26 U.S.C. § 9706.

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[5] The trustees argue that Petitioners receive a "benefit" because, but for the Coal Act, there would be no transfers from the 1950 Pension Plan and the Abandoned Mine Land Reclamation Fund to cover current health care costs for unassigned beneficiaries—the miners (and spouses and dependents) who worked for someone else. Tr. Br. 27. Excuse me? Petitioners had no obligations to these total strangers until the Coal Act was adopted. Avoidance of this wholly new obligation for its first few years is not a "benefit."

4. However, the Coal Act does not rationally apportion liability according to an operator's participation. The government misreads the statute as providing that retirees are "presumptively assigned to any one of their employers that signed the 1978 NBCWA, if such an employer is still in existence." Govt. Br. 22; *see also id.* 8-9. But under the first two statutory assignment priorities, retirees are assigned to a 1978 or later signatory *only if* that signatory both (1) is still in business *and* (2) was "the most recent signatory operator to employ" the retiree. 29 U.S.C. § 9706(a)(1)-(2), Pet. App. 133a. Absent *either* condition, a retiree is assigned to the pre-1978 signatory which is still in business and employed the miner for the longest period of time prior to the 1978 NBCWA. *Id.* § 9706(a)(3), Pet. App. 133a-34a. Thus, for example, if a retiree worked for one of the Petitioners for 5 years, later worked for 4 years for 1978 signatory A that is still in business, and then worked for 8 years for 1978 signatory B that is no longer in business, the retiree would be assigned to the Petitioner, not to 1978 signatory A as the government's interpretation of the statute would suggest. This is because signatory A, though a 1978 signatory and still in business, is not the "most recent signatory operator to employ" the retiree (signatory B was) and thus is not within the first two statutory priorities. The assigned operator (by reason of the third priority) would be the Petitioner, even though the Petitioner was not a 1978 signatory and the retiree had worked for two 1978 signatories. Thus, the Coal Act does not, as the government asserts and as the Taking Clause requires, "rationally apportion[] future financial responsibility according to [these Petitioners'] past participation" in health benefit arrangements. *See* Govt. Br. 22.

5. The government's argument that the Coal Act is constitutional because the Court sustained the constitutionality of MPPAA is flawed. *See* Govt. Br. 23. As we explained in our Petition, the Coal Act presents a signifi-

cantly different issue with respect to interference with Petitioners' legitimate expectations. Pet. 22-24 (citing *Concrete Pipe*, 113 S. Ct. at 2293 (O'Connor, J., concurring)). This issue was not reached by the Court in the MPPAA cases and warrants the Court's review here.

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

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